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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 718

ATLANTIC GULF & PACIFIC CO.,
Appellant,

vs.

LAWRENCE E. GEROSA, AS COMPTROLLER OF THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANT

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IN THE

Supreme Court of the United States

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ATLANTIC GULF & PACIFIC CO.,
Appellant,
against
LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

No. ----------

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant, Atlantic Gulf & Pacific Co., appeals from a final judgment of the Court of Appeals of the State of New York. This statement is submitted in compliance with paragraph 2 of Rule 13 to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The final judgment and opinion of the Court of Appeals of the State of New York was entered in this action on June 10, 1965 and is reported at 16 N. Y. 2d 1. Such judgment affirmed, with one dissent, the final order of the Supreme Court of the State of New York, Appellate Division, First Department, reported without opinion at 18 App. Div. 2d 979 (1st Dept. 1963).

The opinion of the Court of Appeals, together with the dissenting opinion, and the memorandum of the Supreme Court, Appellate Division are attached hereto as Appendix I and Appendix II, respectively.

Jurisdiction

This action was brought under Article 78 of the New York Civil Practice Law and Rules seeking an order setting aside assessments of the New York City Compensating Use Tax imposed by New York City Administrative Code, Ch. 41, Tit. M, Section M41-16.0.b *et seq.* and of interest and penalties relating thereto and seeking a refund of the amounts so assessed. Appellant has relied upon Article I, Section 8 of the Constitution of the United States as a ground upon which Section M41-16.0.b, pursuant to which such assessments were issued, should be held to be contrary to such Constitution. The Court of Appeals of New York held that Section M41-16.0.b as applied does not violate Article I, Section 8 of the Constitution.

The judgment of the Court of Appeals of New York is dated and was entered on June 10, 1965. Appellant's Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of New York on September 7, 1965.

The jurisdiction of the Supreme Court of the United States to hear this appeal is conferred by Section 1257(2) of the Judicial Code, c. 646, 62 Stat. 929, 28 U. S. C. § 1257(2). The cases which sustain the jurisdiction of the Court under Section 1257(2) are *Dahnke-*

Walker Milling Co. v. *Bondurant,* 257 U. S. 282 (1921) and *Senior* v. *Braden,* 295 U. S. 422 (1935). These cases held that this Court has jurisdiction on appeal where the unconstitutionality under the United States Constitution of a state or municipal statute was claimed on the basis of an application of such statute, and such statute was held constitutional as applied by the highest state court of appeal.

Statute Involved

Since the validity of a statute of a state municipality is involved, Section M41-16.0.b of Chapter 41, Title M of the New York City Administrative Code, as in effect in 1954, 1955 and 1956, is set out verbatim in Appendix III.

Question Presented

Is the New York City Compensating Use Tax, as construed to apply to the value of Appellant's dredge regularly used in Appellant's business in several states for over seven years prior to a temporary six-week use of such dredge within New York City, unconstitutional as an unreasonable burden upon interstate commerce in violation of Article I, Section 8 of the Constitution of the United States?

Statement of the Case

This appeal is from a final judgment of the Court of Appeals of New York denying a refund of amounts paid by Appellant to New York City as Compensating Use Tax assessed for the years 1954, 1955 and 1956.

The Facts.

Appellant is a West Virginia corporation with its principal office at 15 Park Row, New York, New York (Record ff. 97-98). It has engaged in the business of dredging rivers and harbors principally on the Atlantic and Gulf of Mexico coasts of the United States for many years.

In December, 1948, in the course of such business, Appellant purchased the dredge "Barlow" from the builder, Ellicott Machine Corporation of Baltimore, Maryland, taking delivery in navigable waters in Norfolk, Virginia (Record ff. 111-113; 513-515; Taxpayer's Exhibits 8 and 9). The purchase price was $1,355,680.59 (Record ff. 265-268). From the time of delivery in December, 1948 until July, 1956, the "Barlow" was used by Appellant in the performance of dredging contracts along the coasts of Florida, South Carolina and Virginia (Record ff. 116-117).

On July 22, 1956, for the first time since its purchase in 1948, the "Barlow" was towed into New York City harbor waters to perform two small dredging and filling contracts which were completed on August 22, 1956. The "Barlow" left New York City waters on September 1, 1956 (Record ff. 117-120; 189-191; 370).

Prior to the use of the "Barlow" in New York City waters, between September, 1954 and June, 1955, a small amount of pipe line and pontoon equipment previously used outside New York City had been used in New York City by Appellant in connection with contracts performed by another pipe line dredge not

otherwise involved in this appeal (Record ff. 295; 350-351).

Appellant filed timely New York City Sales and Compensating Use Tax returns for the taxable periods through 1954, 1955 and 1956 and paid the tax shown to be due thereon, omitting the "Barlow" and the pipe line and pontoon equipment in the belief that they were not taxable under the Compensating Use Tax Law. (Record ff. 89-90; Taxpayer's Exhibit No. 1; ff. 375-376).

Appellee, Comptroller of New York City, after audit and hearings, issued a Final Determination that Appellant's use of the "Barlow" and its related pipe line and pontoon equipment in New York City was subject to the New York City Compensating Use Tax imposed by the New York City Administrative Code, Ch. 41, Tit. M, Section M41-16.0.b, *et seq.*, as in effect in the taxable periods involved. The tax of 3% was applied against the depreciated book value of the "Barlow" on June 30, 1956. The tax was also assessed against the depreciated book value as of June 30, 1956 of the pipe line and pontoon equipment used by Appellant in connection with the contracts performed earlier in 1954 and 1955. (Although the use tax law requires that the tax be based upon "consideration given" or purchase price, the Appellee's regulations apply the tax to the value of the property in the case of used property. The Court below has approved this imposition of the use tax despite Appellant's arguments that such imposition disregards the tax law and is an improper delegation of the taxing powers to the administrator.)

The Compensating Use Tax deficiencies, interest and penalties assessed in such Final Determination are as follows (Record ff. 541-551):

Periods	Principal	Int. Pen.	Total
9/1/54-5/31/55 ...	$ 1,237.57	$ 692.04	$ 1,930.61
6/1/55-5/31/56 ...	1,118.10	508.74	1,626.84
6/1/56-8/31/56 ...	30,732.91	11,678.51	42,411.42
Total	$33,088.58	$12,880.29	$45,968.87

Appellant paid the amounts of tax, interest and penalties so assessed on July 26, 1956. The items taxed which remain in controversy on this appeal are set forth in the following table, showing the depreciated book value of the items and the amount of tax assessed on each:

Item	Depreciated Value	Tax
Dredge "Barlow"	$ 840,875.00	$25,406.25
Pipe Account	140,800.00	4,206.60
Pontoon Line Equipment	40,755.08	1,222.65
Total	$1,027,850.08	$30,835.50

In 1955 and 1956 the New York City Compensating Use Tax did not provide any credit for sales tax or use tax paid to any other jurisdiction and it did not provide for any apportionment of the New York City Compensating Use Tax based upon the amount of use of the property within New York City. No other jurisdiction imposed any such taxes upon the "Barlow", the pipe line or the pontoon equipment.

Proceedings Below.

Appellant's Petition, filed in the Supreme Court of the State of New York, New York County on March 17, 1960, sought an order directing a refund of

$45,968.87, representing the full amount of the tax assessed. The Petition alleged that the tax as imposed upon Appellant was unlawful (1) because the New York City Compensating Use Tax should be construed not to apply to the use of property purchased for use outside New York City and actually used outside New York City for over seven years prior to the New York City use and (2) because if construed to apply in this case, the New York City Compensating Use Tax is unconstitutional under Article 1, Section 8 and the Fourteenth Amendment of the Constitution of the United States and Article 1, Sections 6 and 11 of the Constitution of the State of New York.

On April 29, 1960 the cause was transferred for argument to the Supreme Court of the State of New York, Appellate Division, First Department in accordance with Section 1296 of the New York Civil Practice Act as then in effect.

On March 7, 1963 the Supreme Court of the State of New York, Appellate Division unanimously confirmed, without opinion, the Final Determination of the Appellee and dismissed the Petition, and on May 2, 1963 Appellant appealed to the Court of Appeals of the State of New York on the ground that the construction of the Constitution of the United States and the Constitution of the State of New York was directly involved.

On June 10, 1965 the Court of Appeals of the State of New York held that the New York City Compensating Use Tax should be construed to apply to Appellant's use of the "Barlow", pipe line and pontoon equipment in New York City even though such property was pur-

chased for use outside New York City long before such use in New York City. The Court of Appeals further held that such construction of the New York City Compensating Use Tax does not render the Tax unconstitutional under either Article I, Section 8 or the Fourteenth Amendment of the Constitution of the United States or under the New York Constitution.

How The Federal Question Is Presented.

The constitutionality of the Tax as applied to Appellant's use of the "Barlow", pipe line and pontoon equipment in New York City under the Constitution of the United States was raised by Appellant in the Petition in the Supreme Court of the State of New York (Record ff. 31-32). After transfer of the cause, the issue was briefed and argued in the Appellate Division which confirmed the Final Determination and dismissed the Petition without opinion, citing, *inter alia*, *Henneford* v. *Silas Mason Co., Inc.*, 300 U.S. 577 (1937) and *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167 (1939) (Record f. 583). The Court of Appeals affirmed in an opinion which held in part that the New York City Compensating Use Tax as applied does not violate Article I, Section 8 of the Constitution of the United States (Appendix I). This appeal seeks review of such holding.

The Question Is Substantial.

The fundamental question presented by this appeal is whether or not the threat or possibility of multiple sales and use taxation of property by several states renders unconstitutional the use tax of New York City where the use tax arises in the course of interstate business and commerce and where the tax does not

provide any credit for sales or use taxes paid to other jurisdictions or any apportionment of the tax based upon the amount of use of the property within New York City. Since the threat of such multiple state taxation has the effect of inhibiting the interstate movement of mobile property such as Appellant's dredges and their related equipment, the resolution of this question is of great importance to many interstate and multi-state businesses throughout the country.

The importance of this question is recognized in the Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House of Representatives Committee on the Judiciary, House Report No. 565, Volume 3, Part III (June 30, 1965) (hereinafter referred to as the "Report"). The Appellant's problem as stated therein on p. 824 is as follows:

> "A second form of overtaxation is produced by the multiple imposition of use taxes on property which is moved from one State to another.[14] Here the State of first use levies a tax—sales or use, depending on whether the property was bought there. Subsequent transfers of the property to other States can result in additional use tax liabilities in those States. The problem occurs in the case of such items as construction equipment and vehicles of various kinds, including personal automobiles."

In discussing the ability of various taxpayers to arrange their affairs so as to minimize such multiple state taxation, the Report states at page 830:

> "There are, however, special circumstances in which the course of conduct cannot be so readily altered to avoid overtaxation, and these may give

> rise to a significant amount of overtaxation in those cases. Situations of this kind occur where the movement of property by the owner from one State to another is required in the course of business. The construction industry and the business of distributing motion pictures are examples. The problem also occurs where it is convenient for the owner to move property from one State to another although a particular person does not do so very often. Such a situation occurs when a family changes its residence from one State to another. In view of the number of families which move across State lines each year, the number of instances of possible overtaxation here could be large. For example, for the year ending March 31, 1963, the last year for which figures are available, the Bureau of the Census estimates that 6,640,000 people migrated from one State to another. Assuming four persons per family, this means that well over a million families moved varying amounts of property, including a very large number of automobiles, from one State to another in 1 year alone.[22]"

The Report further points out on p. 834 that sixteen states do not allow a credit for sales or use taxes paid to other states and that eight more allow it only on a reciprocal basis. Thus the New York City Compensating Use Tax is not the only instance in which this question can arise. The tax position of businesses in all of these states is involved in this appeal. The importance of this problem is confirmed by the fact that a bill, H. R. 11798, was introduced in the House of Representatives on October 22, 1965, regulating the degree to which states may tax interstate commerce. Section 302 of this bill requires that states allow a

credit for any sales or use taxes previously paid with respect to the property taxed. Such a credit, if enacted, would effectively remove the future threat of continued multiple state use taxation of transient property.

The question is an important one particularly to a business similar to Appellant's, in which expensive equipment is purchased in one state and used in many states.

Appellant's dredge "Barlow" is moved about from place to place in the performance of its functions. If each jurisdiction imposed taxes similar to the New York City Compensating Use Tax for the privilege of use within each jurisdiction, the entire value of the dredge and such similar property could soon be exhausted in the payment of multiple use taxes.

Although there is no evidence in the record of sales or use taxes having actually been imposed on the "Barlow" or its related equipment by other states, actual multiple taxation is unnecessary. This Court has held that potential or threatened multiple state or local taxation is sufficient to constitute a violation of the Commerce Clause. In *Freeman* v. *Hewitt,* 329 U. S. 249, 283 (1946), Mr. Justice Frankfurter held:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential

taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax."

The approach of the Court to multiple state taxation questions is stated in *Nippert* v. *Richmond,* 327 U. S. 416, 423-424 (1946) as follows:

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes

> valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. . . . whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual *or potential,* of the particular tax in suppressing or burdening unduly the commerce." (Emphasis added).

This approach is applied in cases involving state taxes which discriminate against an interstate business in favor of an intrastate business by holding invalid such discriminatory applications of a state tax. *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U. S. 64 (1963). The reason that the policy of the Commerce Clause overrides a discriminatory application of a state tax is to avoid the economic dislocation resulting from an unnatural organization or operation of a business in order to avoid the burden of excessive state taxation. In Appellant's case the application of the New York City Compensating Use Tax to Appellant's movable equipment without a credit for possible state taxes elsewhere tends to encourage Appellant to purchase a dredge in New York City and maintain it there at all times regardless of where dredging contracts are available, in order to avoid paying another non-creditable sales or use tax to another jurisdiction prior to the New York City use. If all states applied use taxes in such a way, multi-state businesses such as Appellant's may be forced to maintain equipment in the states in which they obtain the most business, leaving contracts in other states to others located in such other

states. Such a result is possible whether or not the business is actually taxed on occasion in more than one jurisdiction. Such a result is clearly intended to be prevented by the Commerce Clause. As Mr. Chief Justice Warren stated in *Halliburton Oil Well Cement Co.* v. *Reily, supra,* at page 72:

> "If Louisiana were the only State to impose an additional tax burden for such out-of-state operations, the disparate treatment would be an incentive to locate within Louisiana; it would tend 'to neutralize advantages belonging to the place of origin.' *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511, 527. Disapproval of such a result is implicit in all cases dealing with tax discrimination, since a tax which is 'discriminatory in favor of the local merchant,' *Nippert* v. *Richmond, supra,* also encourages an out-of-state operator to become a resident in order to compete on equal terms. If similar unequal tax structures were adopted in other States, a not unlikely result of affirming here, the effects would be more widespread. The economic advantages of a single assembly plant for the appellant's multistate activities would be decreased for units sent to every State other than the State of residence. At best, this would encourage the appellant to locate his assembly operations in the State of largest use for the units. At worst, it would encourage their actual fractionalization or discontinuance. Clearly, approval of the Louisiana use tax in this case would 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.' *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 356."

The threat of multiple state taxation of gross receipts of an interstate business without apportionment and without a showing that more than one jurisdiction

actually taxed the same receipts has been held to be a sufficient burden upon interstate commerce to hold the application of the tax in violation of the Commerce Clause. *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422 (1947); *Owen, White & Prince* v. *Henneford*, 305 U. S. 439 (1939); *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938). The same is true of the threat of multiple state income taxation. *Northwestern Cement Co.* v. *Minnesota*, 358 U. S. 450 (1958); cf. *General Motors Corp.* v. *District of Columbia*, 380 U. S. 553 (1965). In *Standard Oil Co.* v. *Peck*, 342 U. S. 382 (1952) it was held that an Ohio ad valorem property tax on the full value of boats and barges used in several states was invalid under the Commerce Clause, since the other states in which the vessels were used could have also imposed such taxes upon their apportionable share of the full value, resulting in burdensome multiple state taxation. See also *Central Railroad of Pennsylvania* v. *Pennsylvania*, 370 U. S. 607 (1962).

Even though the threat of multiple state taxation has been held in the above cases to be an unreasonable burden upon interstate commerce in the types of state taxes involved therein, there appears to be no case which has decided the question in the case of state sales and use taxes. The early decisions in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1936) and *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1938) are distinguishable because, as the Court stated in *Southern Pacific Co.* with reference to the *Silas Mason Co.* case, at p. 172:

> "Under the Washington statute, there considered, discrimination against interstate commerce,

> arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment of error even though the California Act does not have this provision."

In *Southern Pacific Co.* the issue of the possible multiple burden of use tax following a foreign sales tax was said not to be before the court by proper assignment of error and was not passed upon. The Court in *Southern Pacific Co.* passed only on the issue of whether the use tax was an unconstitutional burden on the facilities of interstate commerce, the railroad, of which the purchased articles became a part upon being brought into California. The issue, which has been raised here and which was not raised or passed upon in either the *Silas Mason Co.* or the *Southern Pacific Co.* cases, is whether the threat of a multiplicity of sales or use taxes without any provision for a credit is an undue burden upon the interstate movement of the dredge and its related equipment.

The Report, at pages 834 and 836 recognizes the absence of judicial authority in the situation presented by Appellant's appeal. While it also recognizes the practical difficulties of relying upon judicial determination of all the questions raised by the many state sales and use taxes, it does recommend, at page 893, that particular applications of a state sales or use tax which have a discriminatory effect "would appear ultimately to call for judicial decision." While H. R. 11798 would provide prospective relief to the inter-

state construction business, there is no assurance that the bill will be passed in its present form. In any event it will not operate retroactively to secure Appellant's constitutional rights.

Conclusion

The question presented in this appeal is substantial and of public importance. Probable jurisdiction should therefore be noted.

November 4, 1965.

Respectfully submitted,

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APPENDIX I

Opinion of the Court of Appeals of New York and Dissenting Opinion of Van Voorhis, J., Reported. at 16 N. Y. 2d 1 (1965)

FULD, J. This is an article 78 proceeding to review the determination of the Comptroller of the City of New York imposing a compensating use tax upon a dredge and some pipe lines belonging to the petitioner, a West Virginia corporation having its principal place of business in New York City. The Appellate Division unanimously confirmed the Comptroller's determination and the petitioner appeals as of right on constitutional grounds.

The petitioner, engaged in the business of dredging rivers and harbors, purchased the dredge here involved in Maryland in 1948. It was registered with the United States Coast Guard in December of that year, its home port being designated as "New York, N. Y." The dredge was immediately put to work in South Carolina and was thereafter used—for some eight years—in dredging operations in Florida, South Carolina and Virginia. It was first brought into New York City in July of 1956 and, after completing dredging contracts in the city's harbor waters—which took about six weeks—the dredge was moved to Connecticut in September, 1956.

On the assumption that they were not subject to the New York City use tax, the petitioner omitted from its tax returns both the dredge and certain used pipe and pontoon line equipment (also purchased outside New

York City) which it employed within the city to haul dredged material over water and land to the shore area to be filled. The Comptroller determined, after a hearing, that there was a tax deficiency on these items of about $33,000 plus penalties and interest.[1]

Section M46-16.0 of the Administrative Code of the City of New York (numbered § M41-16.0 at the time the tax herein was imposed) provides in part that "there is hereby imposed and there shall be paid by every person a tax on the use within the city of any tangible personal property purchased at retail.". The term "use" as employed therein is defined as the "exercise of any right or power over tangible personal property by the purchaser thereof and includes but is not limited to the receipt, storage or any keeping or retention *for any length of time,* withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property" (§ M46-15.0, subd. 1; emphasis supplied).

Despite the broad wording of the statute, the petitioner contends that, because the tax is, in terms, based upon the "consideration given" for personal property,[2] its sole purpose is to eliminate sales tax avoidance by imposing a use tax identical with the sales tax but only on property purchased outside the city and brought into the city within a reasonable period after purchase;

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[1] It appears that no sales or use tax (on these items) was paid to any other jurisdiction.

[2] Section M41-16.0 provided, at the time of the transactions in question, that "such tax shall be at the rate of three per centum of the consideration given or contracted to be given for such property or its use plus the cost of transportation, except where such cost is stated and charged separately".

that the statute was not intended to apply to property brought into and used in the city years after its purchase and use elsewhere.

However, in the light of other provisions of the use tax statute, and they must, of course, be considered in ascertaining the actual meaning of the sections here involved, it is clear that the tax is not based only upon the retail selling price to—that is, the "consideration" paid by—the taxpayer. Of great significance is the fact that the Comptroller was granted the power to "prescribe methods for determining the *value* of tangible personal property" (§ M46-28.0, subd. 5; emphasis supplied)—a power not granted him in the sales tax law (§ N46-12.0). The statute also provides for collection from vendors in some instances, and also from purchasers, of use taxes equalling four—at the time in question three—per cent of the "value" of the property sold (§§ M46-19.0, M46-21.0). Moreover, it authorizes a vendor to collect a use tax either at the time of the sale of the property "or if the use is not then taxable hereunder, at the time such use becomes taxable". In similar vein, a purchaser of property, where required to file a return, must show the value of such property, "the use of which became subject to the tax * * * during the preceding quarterly period" (§§ M46-18.0, M46-21.0). Furthermore, and beyond all this, the Comptroller, in the exercise of the general rule-making power granted him by the local law (§ M46-28.0, subd. 1), actually adopted a regulation declaring that property which is used in New York City following its purchase and initial use outside the city shall be subject to a use tax computed on the basis not of the

"purchase price" of the property but of its "value" (City Sales and Use Tax Reg., art. 2[F]).[3]

It seems manifest that the Legislature contemplated that, in appropriate circumstances, a use tax might be imposed not measured by the original price and without relation to the time of sale. Undoubtedly included within the ambit of the statute is a tax upon the use in the city of property such as the present which had been purchased and used for the first time elsewhere, and such a construction has been accorded not only the statute before us (see *Matter of United Air Lines* v. *Joseph*, 281 App. Div. 876, mot. for lv. to app. den. 306 N. Y. 981) but similar statutes in other states. (See, e.g., *Fontenot* v. *S. E. W. Oil Corp.*, 232 La. 1011; *Lane Constr. Corp.* v. *Comptroller*, 228 Md. 90; cf. *Morrison-Knudsen Co.* v. *State Tax Comm.*, 242 Iowa 33; *Rowan Drilling Co.* v. *Bureau of Revenue*, 60 N. M. 123; *Comptroller* v. *Thompson Trailer Corp.*, 209 Md. 490 [cases reaching contrary conclusion by reason of tax laws applicable to personal property "purchased *for use*" in the state and the like].)

Turning to the petitioner's arguments with respect to the alleged unconstitutionality of the use tax law, we note that a number of them—dealing with asserted violations of the interstate commerce and equal protection clauses of the United States Constitution (art. I, § 8; 14th Amdt.) and the State Constitution's provi-

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[3] The text of the Regulation, insofar as pertinent, reads as follows: "Where the property has been used outside the city by a person engaged in business both within and without the city, and is subsequently used in the city by such person, the tax is computed on the *value* of the property rather than the purchase price." (Emphasis supplied.)

sions with respect to the Legislature's powers (N. Y. Const., art. III, § 1)—are based upon the erroneous assumption that the measure of the use tax is solely the purchase price rather than the value of personal property, and, hence, are not relevant.

The petitioner's further constitutional argument—that the use tax is an unconstitutional burden on interstate commerce because of the *possibility* of multiple state taxation—has long been laid to rest. (See, e.g., *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577; cf. *Halliburton Oil Well Co.* v. *Reily,* 373 U. S. 64, 66, 70.) In the *Henneford* case (300 U. S. 577, *supra*), the Supreme Court, after ruling that a use tax does not "hamper the transactions of interstate commerce or discriminate against them" (p. 583), declared, with respect to the possibility of multiple taxation, "It will be time enough to mark [the limits of a state's taxing powers] when a taxpayer paying in the state of origin is compelled to pay again in the state of destination" (p. 587). In *Henneford,* the Washington statute there dealt with provided for a credit against its local tax sales or use taxes paid in other states. However, the Supreme Court reached the same conclusion with respect to the constitutionality of the use tax in the *Southern Pacific Co.* case (306 U. S. 167, *supra*), even though there, as here, the California use tax in question provided no such credit.

As in *Southern Pacific,* so here, no problem of multiple taxation confronts us, for the petitioner acknowledges that there is "no evidence" of any other sales or use tax having been imposed on its dredge or pipe

lines. Nor may it be urged that it is unfair to charge the petitioner a use tax on a product brought into New York City more than eight years after its purchase for two small jobs lasting less than a month and a half. In *Southern Pacific* (306 U. S. 167, *supra*), the use tax was upon railroad equipment, machinery and the like, some of which were installed, upon importation, on interstate transportation facilities. "We think", the Supreme Court wrote, "there was a taxable moment when [these articles] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation" (p. 177; see, also, *Eastern Air Transp.* v. *Tax Comm.*, 285 U. S. 147). Although the court was there interested in the question of a state tax upon the operations of interstate commerce, its decision points up the inconsequence of the shortness of time that a taxed article remains within the state as a factor in determining the tax's validity. In addition, in the *United Air Lines* case (281 App. Div. 876, mot. for lv. to app. den. 306 N. Y. 981, *supra*), the airplane parts held subject to the use tax were installed on airplanes which spent most of their time in travel outside the city. In light of these cases, the taxation of property belonging to a company whose principal place of business was in New York City was not unconstitutional, even though the property has so far been used in the city for less than two months.

One further consideration. The purpose of a use tax is not only to prevent tax avoidance but to enable city retail sellers "to compete upon terms of equality with retail dealers in other states [or cities] who are exempt from a sales tax or any corresponding burden."

(*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 581, *supra*; see, also, *Union Oil Co. of Cal.* v. *State Bd. of Equalization*, 60 Cal. 2d 441.) In a great many instances, and particularly where property worth thousands or hundreds of thousands of dollars and capable of use over a long period of years, might be involved, it is manifest that New York City retail merchants would be at a competitive disadvantage with other merchants if the latter might be saved the expense of a use tax by the simple expedient of buying and using the property outside the city for a period sufficiently long to avoid the imposition of such a tax. Impartial application of the use tax here upheld prevents such an outcome.

We have considered the further arguments advanced by the petitioner and find them without merit.

The order of the Appellate Division should be affirmed, with costs.

VAN VOORHIS, J. (dissenting). The compensating use tax was designed to prevent evasion of the sales tax in case of property purchased outside of New York City for permanent use therein. It seems to me that regardless of whether the 3% tax be computed on the value or the purchase price, it was not intended to apply to equipment, such as this dredge, which was brought into the city only temporarily for the performance of a dredging contract. There is no analogy between that situation and one where, for instance, a resident of New York City purchases an automobile elsewhere for permanent use in the city or, indeed, where airplane parts are purchased elsewhere for installation in planes

in the city (*Matter of United Air Lines* v. *Joseph*, 281 App. Div. 876, mot. for lv. to app. den. 306 N. Y. 981; *Matter of Jacobs* v. *Joseph*, 282 App. Div. 622). Installation of airplane parts in planes in the city is not analogous to the temporary importation of construction or dredging equipment for *ad hoc* use on some particular job.

The order appealed from should, in my judgment, be reversed, the determination of tax and penalties annulled, and money paid or deposited with the city refunded.

Chief Judge DESMOND and Judges DYE, BURKE, SCILEPPI and BERGAN concur with Judge FULD; Judge VAN VOORHIS dissents in an opinion.

Order affirmed.

APPENDIX II

Memorandum Decision of the Supreme Court of New York, Appellate Division (1st Department), Reported at 18 App. Div. 2d 979 (1963)

In the Matter of ATLANTIC GULF & PACIFIC CO., Petitioner, v. LAWRENCE E. GEROSA, as Comptroller of the City of New York, Respondent.—Determination unanimously confirmed and the petition dismissed, with $20 costs and disbursements to respondent. (See *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Matter of United Airlines* v. *Joseph*, 281 App. Div. 876; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167.) Concur—Botein, P. J., Breitel, Valente, Eager and Steuer, JJ.

APPENDIX III

Title M of Chapter 41,* Section M41-16.0.b of the Administrative Code of the City of New York in Effect from July 1, 1952 to June 3, 1955

b. During the period from June twenty-four**, nineteen hundred forty-nine to and including June thirtieth, nineteen hundred fifty-five there is hereby imposed and there shall be paid by every person a tax on the use within the city (1) of any tangible personal property purchased at retail, (2) of any tangible personal property however acquired where not acquired for purposes of resale, if improved, refashioned or enhanced in value by the performance of processing services upon said property by another, and (3) of any information services involving the furnishing of printed, mimeographed, multigraphed matter or matter duplicating written or printed matter in any other manner, other than professional services and services of employees, agents or other persons acting in a representative or fiduciary capacity, or information services furnished to newspapers. Such tax shall be at the rate of two per centum until April thirtieth, nineteen hundred fifty-one, and on and after May first, nineteen hundred fifty-one, at the rate of three per centum of the consideration given or contracted to be given for such property and for such processing or information services, or for the use of such property. "Processing

---

* The 1964 amendments to the Administrative Code changed Chapter 41 to Chapter 46. The designation Chapter 41 in effect in 1954, 1955 and 1956 will be utilized herein.

** So in original.

services" shall mean and include the services of producing, fabricating, processing, printing and, except for the imprinting of copy upon an already printed product, imprinting performed upon the tangible personal property of another, other than the services rendered in connection with the repair, alteration or reconditioning of such tangible personal property to refit it for the use for which it was originally produced. "Information services" shall mean and include the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons.

Title M of Chapter 41,* Section M41-16.0.b of the Administrative Code of the City of New York in Effect from June 3, 1955 through 1956

b. On and after June twenty-fourth, nineteen hundred forty-nine, there is hereby imposed and there shall be paid by every person a tax on the use within the city (1) of any tangible personal property purchased at retail, (2) of any tangible personal property however acquired where not acquired for purposes of resale, if improved, refashioned or enchanced** in value by the performance of processing services upon said property by another, and (3) of any information services involving the furnishing of printed, mimeographed, multigraphed matter or matter duplicating written or printed matter in any other manner, other than professional services and services of employees, agents or

* The 1964 amendments to the Administrative Code changed Chapter 41 to Chapter 46. The designation Chapter 41 in effect in 1954, 1955 and 1956 will be utilized herein.

** So in original.

other persons acting in a representative or fiduciary capacity, or information services furnished to newspapers. Such tax shall be at the rate of two per centum until April thirtieth, nineteen hundred fifty-one, and on and after May first, nineteen hundred fifty-one at the rate of three per centum of the consideration given or contracted to be given for such property and for such processing or information services, or for the use of such property. "Processing services" shall mean and include the services of producing, fabricating, processing, printing and, except for the imprinting of copy upon an already printed product, imprinting performed upon the tangible personal property of another, other than the services rendered in connection with the repair, alteration or reconditioning of such tangible personal property to refit it for the use for which it was originally produced. "Information services" shall mean and include the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons.

Certificate of Service

I certify that copies of the foregoing Jurisdictional Statement were served upon Leo A. Larkin, Esq., Corporation Counsel of the City of New York, Municipal Building, New York, New York, attorney for the Appellee, by hand delivering the same to the office of said Corporation Counsel on this 4th day of November, 1965.

RICHARD H. APPERT
Of Counsel

Office-Supreme Court, U.S.
FILED
DEC 3 1965
JOHN F. DAVIS, CLERK

(38,211)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 718

ATLANTIC GULF & PACIFIC CO.,
Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York, dated June 10, 1965, affirming an order of the Appellate Division of the Supreme Court of that State.

The opinion of the Court of Appeals is reported in 16 NY 2d 1, 209 N. E. 2d 86, and its text is set forth in Appendix I of the appellant's jurisdictional statement (p. A-1). The memorandum opinion of the Appellate Division is officially reported in 18 AD 2d 979, and its text is set forth in Appendix II of that statement (p. A-8).

By this appeal the appellant challenges the constitutional validity of the New York City Compensating Use Tax law when applied to the use in New York City of property purchased and first used outside of New York City. Under this law, such property is subjected to a tax based upon its depreciated value when used in New York City.

It will be seen from the opinion below that the primary thrust of appellant's original attack on the tax determination was based on the view that the use tax law, properly interpreted, did not impose a tax on the use of property purchased and first used outside New York. Its claims of unconstitutionality were secondary and alternative and required consideration only if it failed (as it did) in its interpretative argument. Several of its constitutional arguments were bottomed on the supposition that the tax was based on cost price, not value, a view which appellant insisted the law compelled, but which the Court below rejected (Applts. Juris. Stm't pp. A-4 and A-5). Hence, only one constitutional argument survives the state proceedings, and that argument is the basis for this appeal.

Specifically, appellant contends that the failure of the Use Tax Law to allow a credit against the tax for sales or use taxes paid in other jurisdictions* results in a threat of potential multiple tax burdens which violates the Commerce Clause of the United States Constitution even where, as in this case, no such other tax was paid or incurred (Jurisdictional Statement pp. 8, 9).

This motion to dismiss is made on the ground that the issue raised does not present a substantial federal question.

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* Effective July 1, 1964 the New York City Use Tax law was amended to allow credit (on a reciprocal basis) for taxes actually paid to other jurisdictions (Local Law No. 40 of 1964, adding par. 10 to Admin. Code § M46-17.0). The present New York State and the New York City use tax laws contain similar provisions. N.Y. Tax Law, § 1118(7); Administrative Code of the City of New York, § A46-11.0(7).

Statutes Involved

The provision of the New York City Use Tax Law relevant to this appeal (Administrative Code, § M46-16.0, subds. a and b) is set forth in Appendix III of the Jurisdictional Statement.

Statement of the Case

This proceeding was instituted under the provisions of Article 78 of the Civil Practice Act of the State of New York to review a final determination of the appellee, as Comptroller of the City of New York, which determined tax to be due under the New York City Compensating Use Tax law in the amount of $33,088.58 plus penalty interest of $12,880.29 for the period September 1, 1954 to August 31, 1956.

The determination under review here was issued after a statutory hearing held by the Comptroller of the City of New York at which evidence was adduced and testimony given by appellant and appellee, both having appeared by counsel at such hearing.

Under New York practice the administrative hearing constitutes the trial of the issues in the case (Article 78, N. Y. Civil Practice Act; Article 78, N. Y. Civil Practice Law and Rules). The determination issued in this case after the hearing was initially reviewed by the Supreme Court of the State of New York, Appellate Division, First Department, which unanimously confirmed it. Upon appeal by appellant to the Court of Appeals of the State of New York that court affirmed, with one judge dissenting on non-constitutional interpretative grounds. (Appendix to Applt's Jurisdictional Statement, pp. A-1—A-8).

The Facts

The appellant, a West Virginia corporation (fol. 97) with its principal and home office in New York City (fols. 218-224, 340-341, 347), engaged in the dredging of waterways for government and industry (fols. 82, 89).

In April of 1946 appellant arranged for the construction in Maryland of a dredge, the Barlow, which was delivered to it in Virginia in December 1948 (fols. 167, 113). The dredge was registered with the U. S. Coast Guard as of December 12, 1948, with New York City designated as its home port (fol. 345, City's Exh. G.), and it was put to work in South Carolina, Florida, and Virginia (fols. 115-117).

On July 23, 1956, the Barlow was towed into New York City waters where she was used to perform a dredging and filling contract for the City of New York and a land filling contract for a local real estate developer (fols. 117, 144-146, Applt's Exhs. 6 & 7).

Certain equipment used in connection with the dredge, consisting of pipe to make up a line to carry the dredged material to shore and pontoons on which the pipe was floated, was also brought into New York City during the period covered by the tax determination. This equipment also had been first used in another jurisdiction (fols. 295, 312-323, 349-351).

No sales tax or use tax was paid to any other jurisdiction with respect to the dredge Barlow (fols. 343, 374-375). Having been taken to Virginia for delivery, no Maryland sales or use tax became due on its sale. There is no evidence that any such tax was paid or incurred on the other equipment involved in this case.

Appellant omitted the items in issue from its New York City use tax returns. The appellee applied the tax based on their market value at the time of their use in New York City (fols. 541-551).

ARGUMENT

The imposition of the City's use tax with respect to property used in New York City does not violate the Commerce Clause simply because the City's Tax Law does not give credit for sales or use taxes paid to other jurisdictions where the property was first used when applied in a case where no such tax was paid or incurred to such other jurisdictions.

The appellant's sole contention is that the New York City Use Tax Law, as applied to the use of its dredge and dredging equipment, is invalid under the Commerce Clause because it poses the possibility of multiple taxation in that similar taxes might be imposed by each state into which the taxed property moves.

This Court has twice discussed an identical contention. It has stated that the imposition of a use tax is not invalid merely because the property had previously been used in another jurisdiction which might have, but did not, impose a sales or use tax.

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937), this Court upheld the applicability of the Washington use tax statute which gave credit for sales and use taxes paid in other states. The Court was careful to point out that it was not saying that such a credit or offset was necessary to prevent discrimination against interstate commerce. To forestall the very misconception which lies at the root of petitioner's argument here, Mr. Justice CARDOZO pointedly stated (p. 587):

> "Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere.

> If there are limits to that power, there is no need to mark them now. *It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.*" (Italics ours.)

In *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (1939), the same issue arose under a use tax law which provided no credit for sales or use taxes paid in another state. This Court upheld the California use tax on property purchased elsewhere and then brought into California, saying (pp. 171-172):

> "The principle of the use tax as applied to property brought into the state after its retail purchase for intrastate use has been upheld in *Henneford* v. *Silas Mason Co.,* against the charge that it was a tax upon the operations of interstate commerce or a tax upon a foreign sale, violative of the Fourteenth Amendment. Under the Washington statute, there considered, discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment of error even though the California Act does not have this provision. It will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.' "

Appellant seeks to minimize the import of this Court's two pronouncements by pointing out that in neither of the two cases, was the issue squarely raised. It points out that there was a credit for out-of-state taxes in the Washington statute involved in the *Henneford* case (Applt's Juris. Stm't p. 15) and that in the *Southern Pacific* case, where no such credit was provided by the statute, the issue was not before the court by assignment of error.

The clear language of this Court in both the *Henneford* and *Southern Pacific* cases, whether holding or *obiter dicta,* is but a reiteration of the fundamental rule that an attack on the constitutionality of a law must be made by one who

is injured by the feature of the law under attack. *Hatch* v. *Reardon,* 204 U. S. 152, 160-161 (1907); *Darnell* v. *Indiana,* 226 U. S. 390 (1912); *Premier Pabst Co.* v. *Grosscup,* 298 U. S. 226 (1936).

Here, as in the *Southern Pacific* case, appellant has not been burdened by a second use or sales tax. The time is not ripe for its claim of multiple taxation; it may be when another jurisdiction refuses to credit it with the New York City tax here in issue.

Appellant seems to concede that the inclusion of a provision in the New York City Use Tax Law giving a credit for taxes paid to other jurisdictions would save the law's constitutional applicability to it. In this regard it points with apparent approval to such a proposed solution contained in H. R. 11798, [§ 302(b)], a bill prepared after a Congressional study of the impact of State taxes on interstate commerce. Yet, if there had been such a credit, it would have given appellant no comfort. It would have remained subject to the tax as imposed.

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

December 1, 1965.

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